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No. 91-366

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MARK S. CURENTON; EDWARD MURTAGH DEMPSEY,
Plaintiffs,

EDWARD MURTAGH DEMPSEY,
Petitioner,

vs.

TOWN OF BRIGHTON; EUGENE SHAW, CHIEF OF POLICE OF THE TOWN OF BRIGHTON; TOWN OF BRIGHTON POLICE DEPARTMENT; Officers THOMAS SLEEP, ROBERT E. HICKEY, FRED J. MELLINI; SERGEANT WILLIAM LARONDE; DOES 1 THROUGH 6,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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(17774)

QUESTION PRESENTED

Did the court below correctly uphold the District Court's determination that: respondent's 13-minute detention of petitioner was reasonable; the amount of force used in effecting the detention was reasonable; petitioner failed to establish any basis for municipal liability; and the individual officers were entitled to qualified immunity?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Preliminary Statement

Plaintiffs Mark Curenton and Edward Dempsey commenced these actions pursuant to 42 U.S.C. §1983 alleging that their 13-minute detention by respondents, who believed them to have been involved in a bank robbery, violated their civil rights.

The Detention

At 1:32 p.m. on the afternoon of June 12, 1987, a black man entered the Monroe Savings Bank on Monroe Avenue, in the Town of Brighton, and handed the teller a note written on a brown paper bag telling her that she should place all of her ones,

fives and tens in the bag. While the robber did not display a weapon, either he or the note stated that he was armed. The teller then placed money in the bag and the robber left the bank on foot. When last seen, he was walking out of the bank on foot and appeared to be headed westerly toward the City of Rochester.

The robbery took place over a brief period of time, approximately two minutes. The robber was observed primarily by the teller from whom he demanded the money. Another teller and the supervising teller also viewed him briefly. The bank notified the Brighton Police Department of the incident, and it responded immediately. The initial description broadcast to Brighton Police units on patrol described the robber as "a young black male wearing a blue jacket, unknown if a weapon was shown. Last seen heading towards the city on foot on Monroe Avenue." (A 79[1])

Subsequently, another description broadcast over the radio reported that the suspect was wearing a blue hat, dark glasses, a long-sleeved burgundy shirt and blue jeans. (A 79) A third description reported that the suspect was six feet tall, of slim build, wearing a long-sleeved purple shirt, blue jeans, a tan hat with a chin strap, and sunglasses. The dispatcher noted that a gun was threatened, but not displayed. (A 80-81)

Brighton Police Officer Thomas Sleep, a seventeen-year veteran with the force, was assigned to patrol the area near the bank in search of the bank robber. At approximately 2:29 p.m. he was driving westerly on Monroe Avenue and was stopped in traffic in the passing lane approximately four car lengths east of the traffic light at Monroe Avenue and Highland Avenue. This location is a few blocks from the bank.

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[1] References are to the appendix to the petition.

As he was waiting, Officer Sleep saw a black man, who was about six feet tall and who was wearing blue clothing and glasses, cut through low bushes and get into a blue Toyota which was pulled up to the curb. The man was carrying a bag. The vehicle then proceeded westerly and turned northeast at the next intersection, onto Highland Avenue.

Officer Sleep radioed to the dispatcher that he had just seen a male subject jump into a car on Highland Avenue, and that the suspect was wearing blue. He asked whether the robber had been wearing "dark glasses," and was advised that the robber was wearing sunglasses. Officer Sleep then stated that he intended to stop the vehicle. (A 81-82)

Officer Sleep turned on his flashing lights, and the vehicle pulled to a stop. Based on his belief that the suspects might be armed, Officer Sleep followed felony-stop procedures which the Brighton police are trained to employ in potentially violent situations. He exited his vehicle and, crouching behind the driver's side door, aimed his service revolver at the vehicle. Shortly thereafter, Officer Robert Hickey arrived and pulled his vehicle in behind Officer Sleep's vehicle. Officer Hickey then exited his car and pointed his gun at the suspects' vehicle.

Officer Sleep ordered the driver to throw his car keys out the driver's side window and ordered both men to put their hands on the windshield, which they did. He then ordered the passenger, Mark Curenton, to crawl out the passenger door and lie face down on the grass between the sidewalk and the curb, which he did. Officer Sleep then directed the driver, Edward Dempsey, to do the same, which he did.

Officer Hickey holstered his weapon as he approached the suspects, who were lying face down on the grass, arms and legs

spread. During this period, Dempsey was yelling that he knew the Brighton Town Supervisor personally and wanted to talk to him.

Officer Mellini arrived as Officer Hickey was handcuffing Dempsey. Officer Mellini drew his weapon and pointed it at the suspects briefly. He holstered his gun as he approached the suspects to assist in the handcuffing process. Sergeant LaRonde arrived as the suspects were being handcuffed.

Officer Hickey followed his usual procedure in handcuffing the suspects: he directed one hand behind the subject's back, placed a handcuff on the wrist, then instructed the subject to bring his other arm around, then handcuffed the second wrist. Dempsey claims that Officer Hickey purposely stepped on his hand during this process. Officer Hickey does not recall any physical struggle on the part of the suspects and does not recall stepping on Dempsey's hand. Nor do the other officers recall him stepping on Dempsey's hand. Officer Mellini assisted Officer Hickey in handcuffing Curenton.

Officers Hickey and Mellini then helped the suspects to their feet and conducted a pat-down search of each suspect. Once the search had revealed that the suspects were unarmed, the handcuffs were removed. There were no weapons directed at the suspects at this time.

The officers estimate that the suspects had guns pointed at them for approximately two to three minutes, and that the suspects were handcuffed for less than one minute. Dempsey acknowledges that the guns were holstered within seconds of his being handcuffed. He estimates he was handcuffed for about ten minutes.

Sergeant LaRonde then ordered Officer Mellini to take Curenton back to the bank for a show-up identification. He did so based on the information provided by a witness to a police inves-

tigator at the bank that a white man had jumped into a small blue car[2] and sped away quickly from the area of the bank at approximately the time of the robbery, and the fact that Curenton matched the general description of the bank robber.

Officer Mellini then transported Curenton to the bank, approximately two to three blocks away, where the bank tellers viewed him through the bank's plate glass window and advised the police that he was not the perpetrator of the robbery. Curenton was not handcuffed when he was transported to the bank. Officer Mellini then drove Curenton back to Dempsey's vehicle, and Dempsey and Curenton were released.

Following the negative identification, the officers apologized and advised the suspects that they had been stopped because Curenton matched the description of a bank robber. Furthermore, they explained that they had followed felony-stop procedures for the safety of the officers and the suspects. Officer Hickey gave Dempsey his card and told petitioner to have his boss call him if he was late to work. After the defendants apologized, Dempsey smiled and told the officers that he had been scared at first, but that he had received rougher treatment from his mother. Plaintiffs were detained for 13 minutes, from 2:29 p.m. to 2:42 p.m.

Neither plaintiff was physically injured. No crowd gathered at the scene of the detention, and Curenton and Dempsey testified that no one they knew saw them.

Mark Curenton is black, about 6 feet tall and of medium build. At the time of his detention, he was twenty-one years old and was wearing clear-lensed glasses, a baseball shirt with a white body and blue three-quarter length sleeves, burgundy or gray pants and sneakers. Curenton testified that, at the time of the detention, he was waiting for Dempsey, who drove him to work. While

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[2] Dempsey is white and drives a four-door blue Toyota compact.

he was waiting, State Police Trooper Kim Smith and State Police Sergeant Frank Murray observed Curenton at the corner. Each concluded that he did not match the description he or she had heard and therefore decided not to question him. They did not see Curenton get into a blue car.

Sergeant Murray and Trooper Smith received descriptions of the bank robber over the Monroe County Emergency Communications frequency. They did not receive the Brighton Police frequency.

Sergeant Murray also observed the defendants' detention of Curenton and Dempsey. He did not participate or assist in the stop because he believed the defendants had the situation under control.

Approximately two months later, Franklin Leonard confessed to having committed the June 12, 1987, Monroe Savings Bank bank robbery. Leonard is now in prison.

Training and Supervision

Plaintiffs also alleged that the Brighton Police Department negligently trained and supervised the respondent officers. In support of their cross motion for summary judgment, respondents established that the felony-stop procedures followed by the defendants were consistent with their departmental training and the training of the New York State Division of Criminal Justice Services Bureau of Municipal Police.

Each member of the Brighton Police Department has been trained at a police academy or the Criminal Justice Training Center and instructed on the fundamentals of New York Criminal Procedure Law, Penal Law, arrest and detention standards and procedures, use of force, and a wide variety of related topics. This training is consistent with the training provided by the New

York State Division of Criminal Justice Services Bureau of Municipal Police.

Additionally, all Brighton police officers receive ongoing, in-service training and may attend further intensive training on such subjects as use of firearms and deadly physical force, use of radar, criminal investigations, and numerous other subjects. Each officer is also provided with the general orders of the Brighton Police Department, which are updated regularly and address a broad range of topics. The Department has specific policies and procedures for responding to a bank robbery, arrest and detention and use of firearms.

Further, each officer is required to maintain a notebook of training keys which are published by the Bureau of Operations and Research of the International Association of Chiefs of Police. The training keys include felony vehicle approaches, felony vehicle stops and searching prisoners.

The Department also requires each officer to watch video training tapes produced and distributed by the Criminal Justice Training Center covering such issues as probable cause, searching subjects, handcuffing suspects, stop and frisk, officer safety and eyewitness identification.

Petitioner offered no evidence in support of his contention that respondents' training and supervision was negligent. (A 72)

Proceedings Below

At the conclusion of lengthy discovery proceedings, plaintiffs Dempsey and Curenton moved for partial summary judgment on the issues of false arrest and excessive use of force. Respondents cross-moved for partial summary judgment on the issue of negligent training and supervision by the police department. The District Court granted respondents' cross-motion for summary judgment on the issue of negligent training and supervision and,

sua sponte, granted summary judgment to all respondents on the issues of false arrest and excessive force and to the individual defendants on the basis of qualified immunity. (A 77-78)

Plaintiff Dempsey (petitioner) appealed Judge Larimer's grant of summary judgment. Plaintiff Curenton did not appeal. The Court of Appeals upheld the District Court decision. (A 2-3)

SUMMARY OF ARGUMENT

This case does not warrant the granting of a writ of certiorari. Rule 10 of the Rules of the Supreme Court of the United States enumerates some of the considerations which may prompt the Court to grant certiorari. Those reasons include conflicting decisions of the Courts of Appeals; state court decisions on federal questions which conflict with decisions of United States Courts of Appeals or other state courts of last resort; or United States Courts of Appeals' decisions on important federal questions which conflict with established Supreme Court precedent. Petitioner has not established, or even argued, that this case presents any such considerations. It does not. Instead, he argues merely that his case was wrongly decided by the lower courts.

Respondents maintain that the court below properly upheld the District Court's summary judgment in favor of respondents, and there is no reason which would warrant the granting of certiorari in this case.

ARGUMENT

THE WRIT SHOULD BE DENIED

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT SINCE THE SECOND CIRCUIT'S OPINION IS CONSISTENT WITH THE PRECEDENTS OF THIS COURT AND OTHER COURTS OF APPEALS

I.

PETITIONER'S DETENTION FOR INVESTIGATIVE PURPOSES WAS REASONABLE

An investigative detention which is limited in scope and includes the transportation of the suspect to the nearby crime scene for identification is lawful where the police believe the suspect matches the description of the perpetrator and diligently pursue investigation in a reasonable manner. *United States v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 605 (1985).

In *United States v. Sharpe*, this Court explained the policy considerations involving investigative detentions as follows:

> [W]e have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.

Id. at 685, 84 L. Ed. at 615 (citations omitted). Furthermore, this Court has admonished courts not to "indulge in unrealistic second guessing" about whether an arrest occurred or should have occurred when "the police are acting in a swiftly developing situation." *Id.* at 686, 84 L. Ed. 2d 605, 616 (1979).

The police officers who detained petitioners were entitled to rely on the description of the suspect which had been broadcast over the police radio in stopping the suspects for the purpose of identification. *United States v. Hensley*, 469 U.S. 221, 83 L. Ed. 2d 604 (1985). The broadcast descriptions of the bank robber included a young, black male, approximately six feet in height, of slim build, wearing a blue jacket or long-sleeved burgundy shirt, sunglasses, and a blue or tan hat. Curenton is approximately six feet tall and of medium build, was 21 years old and wearing a shirt with blue sleeves and glasses, and was carrying a bag. Furthermore, Officer Sleep testified that he observed Curenton emerging from bushes within a few blocks of the bank and getting into a car, which then drove away.

While Curenton did not match any of the descriptions exactly, he met the general description. Moreover, the descriptions varied considerably and eyewitness descriptions are known to be of questionable reliability. Based on his experience that there is frequently an additional individual in a getaway car, Curenton's actions and appearance, and his close proximity to the bank within one hour of the robbery, Officer Sleep's detention of the plaintiffs was based on reasonable suspicion.

Moreover, respondents acted quickly to confirm or dispel their suspicions. An investigative detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983). This Court has held that there is no rigid time limitation which converts an investigative detention, as defined in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), into an arrest. *United States v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 605 (1985).

Thus, in *United States v. Sharpe,* the Court concluded that a 20-minute investigative detention was not unreasonable. The Court noted that the defendants "diligently pursued a means of investi-

gation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Id.* at 686, 84 L. Ed. 2d at 616.

As the courts below held, respondents reasonably detained Dempsey and Curenton only as long as was necessary to confirm that they were not involved in the Monroe Savings Bank robbery, at which time they were immediately released. These circumstances gave rise to no issues of law which merit review by this Court.

II.

RESPONDENTS USED REASONABLE FORCE IN EFFECTING THE STOP

In order to establish a Fourth Amendment excessive force claim, petitioner must show that the force used by the respondent officers was, in light of the facts and circumstances confronting them, objectively unreasonable. *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 453 (1989). This Court has held that

> the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *** The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. at 396-397, 104 L. Ed. 2d at 455-456.

The test is an objective one: "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." 490 U.S. at 397, 104 L. Ed. 2d at 456. A proper assessment of whether the force used was excessive

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham v. Connor, 490 U.S. at 396, 104 L. Ed. 2d at 455.

The Courts of Appeals have recognized that it is reasonable for a police officer to draw his gun while approaching a vehicle whose occupant may be an escaping armed felon. *United States v. Jackson*, 652 F.2d 244 (2d Cir. 1981), *cert. denied*, 454 U.S. 1057, 70 L. Ed. 2d 594 (1981); *United States v. Manbeck*, 744 F.2d 360, 377 (4th Cir. 1984), *cert. denied sub nom. O'Hare v. United States*, 469 U.S. 1217, 84 L. Ed. 2d 342 (1985); *United States v. Trullo*, 809 F.2d 108, 113 (1st Cir. 1987), *cert. denied*, 482 U.S. 916, 96 L. Ed. 2d 679 (1987). As stated by Judge Van Graafeiland in *United States v. Harley*, 682 F.2d 398, 402 (2d Cir. 1982):

> [T]here is no hard and fast rule concerning the display of weapons. ... What might be unreasonable when an officer merely suspects that a minor offense has been committed is not unreasonable when, as here, officers have reason to fear that a suspected criminal is armed. The nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, the reaction of the suspect to the approach of police are all facts which bear on the issue of reasonableness.

Such a show of force does not raise an investigative detention to the level of an arrest. In *United States v. Jackson*, 652 F.2d 244, 249-250 (2d Cir. 1981), the Court of Appeals explained that:

> [T]o allow such protective measures to transform an investigative stop into an arrest would create a dangerous dilemma for the police officer in those situations, like this one, where suspicion does not rise to the level of probable cause. If the officer approaches a suspected robber with his gun still in his holster, he increases the risk that he will be shot. If, on the other hand, he protects himself by drawing his gun, he

> increases the risk that a court will set the criminal free by construing his action as an illegal arrest.

The Court concluded that it would be unreasonable to require police officers to take such unnecessary risks. Furthermore, it should be noted that, in the present matter, respondents holstered their guns as soon as the pat-down searches of the suspects were completed and it was determined that the suspects were not armed.

Ancillary to the statutory right to detain is an officer's authority to frisk a suspect if he reasonably suspects that he is in danger of physical injury. *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 910 (1968); *United States v. Jackson*, 918 F.2d 236 (1st Cir. 1990). Furthermore, the Courts of Appeals have held that the use of handcuffs does not raise an investigative detention to the level of an arrest. *United States v. Glenna*, 878 F.2d 967 (7th Cir. 1989) (no arrest where the suspect was handcuffed for 10-15 minutes while the police searched his vehicle); *United States v. Bautista*, 509 F.2d 675 (9th Cir. 1975) *cert. denied sub nom. Monsivais v. United States*, 421 U.S. 976, 44 L.Ed. 2d 467 (1975); *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983). Thus, it is clear that the fact that petitioner was handcuffed only briefly for the purpose of ensuring officer safety does not mean that he was under arrest.

This incident represents an unfortunate case of mistaken identity. Respondents stopped Dempsey and Curenton in the reasonable belief that Curenton matched the eyewitnesses' descriptions broadcast over the police radio, and pursued a minimally intrusive investigation intended to confirm or dispel suspicion quickly, while protecting their own safety. Respondents followed accepted procedures in conducting the detention, and were thus able to release Dempsey and Curenton in less than 20 minutes, having ensured that no one was hurt and that the two were not, in fact, involved in the bank robbery. The determination of the

lower courts that respondents' detention of the petitioner was reasonable did not involve any novel issues of law, and there is no reason for the matter to be considered by this Court.

III.

PETITIONER FAILED TO ESTABLISH ANY BASIS FOR MUNICIPAL LIABILITY

This Court recently held that:

> [T]he inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact.

City of Canton, Ohio v. Harris, 489 U.S. 378, 388, 103 L. Ed. 2d 412, 426 (1989) (emphasis supplied). Furthermore, the Court held that in any case alleging municipal liability under Section 1983, there must be a direct causal link between the municipal policy or custom and the alleged constitutional deprivation. *Id.* Proof of causation is required because a municipality can be held liable under Section 1983 *only* when the municipality itself *causes* the constitutional violation at issue. "Respondeat superior or vicarious liability will not attach under §1983." *Id.* at 385, 103 L. Ed. 2d at 424 (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611 (1978)).

In other words, "a municipality can be liable under §1983 *only* where its policies are the *moving force* behind the constitutional violation." *City of Canton, Ohio v. Harris*, 489 U.S. at 389, 103 L. Ed. 2d at 427, *quoting Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 56 L. Ed. 2d 611 (1978), and *Polk County v. Dodson*, 454 U.S. 312, 70 L. Ed. 2d 509 (1981) (emphasis supplied). Recovery from a municipality is thus limited to acts "of the municipality", that is, acts which the municipality has officially sanctioned or ordered. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 89 L. Ed. 2d 452 (1986).

In the course of this litigation petitioner deposed thirteen individuals and served five sets of interrogatories and three notices to admit. He also obtained copies of respondents' relevant personnel files. Nevertheless, petitioner was unable to show *any* departmental custom or policy which would cause or condone civil rights violations.[3] On the contrary, as noted by the District Court, the department maintains an extensive training program. (A 69-70n.)

Moreover, in support of his claim, petitioner cites merely this single incident. However, single acts or isolated incidents are insufficient as a matter of law to establish the "official policy requisite to municipal liability under §1983." *Oklahoma City v. Tuttle*, 471 U.S. 808, 85 L. Ed. 2d 791 (1985).

Since petitioner failed to furnish any evidence of a municipal policy or practice of deliberate indifference and causation, the court below properly upheld the dismissal of petitioner's claims of negligent training and supervision. The determinations below relied on uncontroversial principles established by decisions of this Court and do not merit review.

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[3] Contrary to petitioner's contention, Use of Force Reports are maintained by respondents, but none were filed since no force was employed in this detention other than the display of weapons. The magistrate reviewed petitioner's contention in this regard and reasonably concluded that if no Use of Force Reports existed regarding this incident, then none needed to be produced.

IV.

THE INDIVIDUAL OFFICER RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY

Municipal employees are shielded from personal liability where the employee's conduct has not violated established legal standards:

> Government officials performing discretionary functions are shielded from personal liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed 2d 396 (1982). Even where the law is "clearly established" and the scope of an official's permissible conduct is "clearly defined," the qualified immunity defense also protects an official if it was "objectively reasonable" for him at the time of the challenged action to believe his acts were lawful. *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3039-40, 97 L. Ed 2d 523 (1987) (explaining *Harlow v. Fitzgerald*, 457 U.S. at 800, 102 S. Ct. at 2727); *Robison v. Via*, 821 F.2d 913, 920-21 (2d Cir. 1987).

Warren v. Dwyer, 906 F.2d 70, 74 (2d Cir. 1990), *cert. denied*, __U.S.__, 112 L. Ed. 2d 414 (1990). Thus, the individual defendants are entitled to qualified immunity on two grounds: their conduct was objectively reasonable, and it did not violate "clearly established" rights. *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990).

As the District Court held, the respondent officers acted reasonably, and in accordance with Fourth Amendment standards, in detaining Dempsey to investigate the robbery at the Monroe Savings Bank.

Officer Sleep stopped the plaintiff in the reasonable belief that Curenton matched the description broadcast over the police radio. Respondents then pursued a minimally intrusive investiga-

tion intended to confirm or dispel suspicion quickly, while protecting their own safety. These actions were objectively reasonable.

Significantly, a New York Court of Appeals decision rendered approximately one year before this incident specifically authorized such a detention and a prompt show-up identification for the purpose of investigating a robbery and a prompt show-up identification. *People v. Hicks*, 68 N.Y.2d 234, 508 N.Y.S.2d 163 (1986). The officers are therefore also entitled to qualified immunity because their conduct did not violate any "clearly established" legal rights.

Accordingly, the court below properly upheld the dismissal of the claims against the individual officers on the basis of qualified immunity.

V.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT

Summary judgment is properly granted when there is no genuine issue as to any material fact and when, based upon facts not in dispute, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 273 (1986).

This Court has held that a district judge may search the record and grant summary judgment where appropriate:

> [T]he motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of this summary judgment rule is to isolate and dispose of factually unsupported claims or defenses ....

Id. at 323-24, 91 L. Ed. 2d at 274. Furthermore, "the District

Courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* at 326, 91 L. Ed. 2d at 275.

The rule is also well established that the mere existence of some factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202 (1986). Thus, the "preliminary question for the judge [is] not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed." *Id.* at 251, 91 L. Ed. 2d at 202, quoting *Improvement Co. v. Munson*, 14 Wall 442, 448, 20 L. Ed. 867 (1872).

In this case, petitioner himself moved for summary judgment, arguing that there were no material issues of fact regarding his detention. Petitioner was aware that he should present all his evidence to the court and, in fact, provided the court with not only his initial moving papers, but three supplemental affidavits and numerous exhibits.

Petitioner now selectively claims that certain facts are disputed. Petitioner argues that there are no disputed facts as to whether the detention constituted an arrest without probable cause, and whether excessive force was used, but maintains that "in all other respects" there remain issues of fact. (Petition, p. 48). He argues that there are credibility issues (*id.* pp. 28-29, 55) and makes various other references to tangential and irrelevant "disputed" facts such as whether or not Officer Sleep followed petitioner before detaining him (p. 40) or whether Officer Hickey deliberately stepped on petitioner's hand in the process of handcuffing him (p. 37).

Petitioner cannot have it both ways. These allegedly disputed facts all relate to the issues of the reasonableness of the detention

and the amount of force used, *the very issues on which petitioner moved for summary judgment*. Moreover, even if petitioner's version of events were accepted, he cannot establish any violation of his civil rights.

It is undisputed that Dempsey was detained for less than 20 minutes because Mark Curenton matched the general description of the robber of the Monroe Savings Bank. Furthermore, it is undisputed that the officers directed their guns at the suspects briefly, handcuffed them and searched them for weapons.

Petitioner claimed that one of the officers intentionally stepped on his hand while handcuffing him. While the officer does not recall doing so, as the District Court held, even if the officer inadvertently stepped on petitioner's hand, such an act did not constitute use of excessive force. (See footnote 4 of the District Court opinion published at 749 F. Supp. 1215, 1225; the footnote was omitted from petitioner's appendix.)

Finally, petitioner failed to submit any evidence that his allegedly unconstitutional arrest was the product of a police department policy or practice. While he made various claims as to variances from the Department's policies and training, they are immaterial. Such a failure requires the grant of summary judgment on behalf of the municipality.

Based on the undisputed facts, petitioner submitted his motion for summary judgment, respondents cross moved, and the District Court reasonably held that summary judgment was appropriate. The Court of Appeals upheld the District Court's ruling, and petitioner's attempts to create genuine and material issues of fact at this late date are disingenuous and do not provide this Court with a basis for granting certiorari.

CONCLUSION

Petitioner has failed to establish any basis for the grant of certiorari. The Court of Appeals properly upheld the District Court's grant of summary judgment to respondents.

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Respectfully submitted,

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